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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIRST APPELLATE DISTRICT  
DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

JIMMY RODGERS

Defendant and Appellant.

A124980

(San Francisco County Super. Ct. No. 199733)

This appeal comes to us following revocation of defendant's probation and imposition upon him of a sentence of 16 months in state prison. His appellate counsel has raised no issues and asks this court for an independent review of the record to determine whether there are any issues that would, if resolved favorably to defendant, result in reversal or modification of the judgment. (*People v. Kelly* (2006) 40 Cal.4th 106; *People v. Wende* (1979) 25 Cal.3d 436.) Defendant was notified of his right to file a supplemental brief, but has not done so. Upon independent review of the record, we conclude that no arguable issues are presented for review, and affirm the judgment.

**STATEMENT OF FACTS AND PROCEDURAL HISTORY<sup>1</sup>**

Defendant entered a plea of guilty to petty theft with prior petty theft convictions (Pen. Code, § 666), and misdemeanor battery (Pen. Code, § 242), based on an incident that occurred at a Walgreens store in San Francisco on August 23, 2006. An employee

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<sup>1</sup> In light of defendant's plea, our recitation of the facts pertinent to the underlying offenses will be concise, and will be taken from the probation report and the probation revocation hearing.

observed defendant take several items from the store, conceal them in his jacket, and leave without paying for the merchandise. Another store employee followed defendant and approached him on the street to demand a return of the appropriated items. Defendant returned only some of the merchandise, and threatened to stab the Walgreen's employee. As defendant reached into his jacket, the employee grabbed his hand. Defendant then grabbed the employee by the neck and attempted to choke him. During the ensuing struggle between them additional items fell from defendant's jacket. When the police arrived, defendant claimed that he paid for the merchandise, which had a total value of \$115.60, but could not produce a receipt for them. A crack pipe was subsequently discovered in defendant's pants pocket. Defendant entered a guilty plea to the petty theft and battery charges, and on October 27, 2006, imposition of sentence was suspended and he was placed on formal probation for three years.

A motion to revoke defendant's probation was filed on February 22, 2007, due to his arrest three days before for petty theft at a Bell Market in San Francisco and obstruction of a peace officer (Pen. Code, § 148, subd. (a)(1)) who investigated the theft offense. At a hearing on March 9, 2007, defendant admitted the probation violation for refusal to obey all laws. His probation was reinstated, with the modification that he serve an additional 60 days in county jail.

A second motion to revoke defendant's probation was filed on June 10, 2008, again based on an arrest for petty theft. After admonishment and waiver of his rights defendant admitted the probation violation at a hearing on July 18, 2008. His probation was modified to impose a condition that he serve 90 days in county jail, and as so modified was reinstated until December 14, 2009.

On November 13, 2008, yet another motion to revoke probation was filed that alleged defendant committed an act of petty theft at the Macy's Stonestown store in San Francisco. A contested hearing on the motion was held on May 6, 2009. At the hearing the prosecution presented testimony from Fred Quinn, the Macy's loss prevention manager, who described a video taken by the store security system. Quinn observed and the video depicted defendant as he concealed items taken from the clothing department in

his jacket, then immediately exited the store. Quinn and another loss prevention agent then left the store to follow defendant. Defendant was asked to stop, but he ignored the request and ran away. Quinn ceased the pursuit, but contacted a San Francisco State University patrol officer, Sergeant Emiliano Balistreri, on 19th Avenue to report that defendant had stolen items from the store. Officer Balistreri observed defendant as he ran across 19th Avenue, and took up the chase on his motorcycle. Officer Edmund Velez was also dispatched to assist Sergeant Balistreri in the pursuit. Defendant failed to respond to orders to stop, but was eventually apprehended by Sergeant Balistreri on 19th Avenue after he was struck by a passing car. A search of defendant by Officer Velez resulted in seizure of clothing items taken from the Macy's store.

Following the hearing the trial court found that defendant committed a willful violation of probation. The court examined the circumstances in aggravation and mitigation stated in the probation report and found that defendant is not amenable to probation following his third revocation of probation. Defendant's probation was revoked, and at a subsequent hearing the court imposed the lower term of 16 months in state prison. He was given a total of 492 days of sentence credits, and placed on parole for a period of 48 months. Defendant was also ordered to pay a \$200 restitution fine, a \$200 parole violation fine was stayed pending successful completion of parole.

### **DISCUSSION**

"Penal Code section 1237.5 provides that a defendant may not appeal 'from a judgment of conviction upon a plea of guilty or nolo contendere' unless the defendant has applied to the trial court for, and the trial court has executed and filed, 'a certificate of probable cause for such appeal.' [Citation.] 'Despite this broad language, we have held that two types of issues may be raised on appeal following a guilty or nolo plea without the need for a certificate: issues relating to the validity of a search and seizure, for which an appeal is provided under [Penal Code] section 1538.5, subdivision (m), and issues regarding proceedings held subsequent to the plea for the purpose of determining the degree of the crime and the penalty to be imposed.' [Citation.] [¶] The statutory requirement and its exceptions are embodied in rule 30(b)(4) of the California Rules of

Court, which provides that on appeal in a criminal case from a superior court judgment after a plea of guilty or nolo contendere, a defendant must apply for and obtain a certificate of probable cause as required by Penal Code section 1237.5 unless ‘the notice of appeal states that the appeal is based on: [¶] (A) the denial of a motion to suppress evidence under Penal Code section 1538.5, or [¶] (B) grounds that arose after entry of the plea and do not affect the plea’s validity.’ ” (*People v. Shelton* (2006) 37 Cal.4th 759, 766; see also *People v. Buttram* (2003) 30 Cal.4th 773, 780.)<sup>2</sup> Defendant has not obtained a certificate of probable cause, so he cannot challenge the validity of his plea or admissions. (*People v. Cole* (2001) 88 Cal.App.4th 850, 868.)

We find no arguable search and seizure issues. Defendant did not make a motion to suppress evidence pursuant to section 1538.5, and the record does not reveal any search and seizure issues to be considered.

We find no error in the revocation of appellant’s probation and imposition of a state prison sentence. The trial court’s finding of a probation violation is amply supported by evidence that defendant violated the law by committing petty theft.

There are no sentencing errors. Where, as here, imposition of sentence was initially suspended, the decision to revoke probation and impose a state prison sentence is a sentence choice which requires a statement of reasons. (*People v. Cotton* (1991) 230 Cal.App.3d 1072, 1081; *People v. Hawthorne* (1991) 226 Cal.App.3d 789, 794; *People v. Jones* (1990) 224 Cal.App.3d 1309, 1315; *People v. Pennington* (1989) 213 Cal.App.3d

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<sup>2</sup> The current version of rule 30(b) of the California Rules of Court, is rule 8.304(b) (effective July 1, 2007), which provides “(1) Except as provided in (4), to appeal from a superior court judgment after a plea of guilty or nolo contendere or after an admission of probation violation, the defendant must file in that superior court – with the notice of appeal required by (a) – the statement required by Penal Code section 1237.5 for issuance of a certificate of probable cause. [¶] (2) Within 20 days after the defendant files a statement under (1), the superior court must sign and file either a certificate of probable cause or an order denying the certificate. [¶] (3) If the defendant does not file the statement required by (1) or if the superior court denies a certificate of probable cause, the superior court clerk must mark the notice of appeal ‘Inoperative,’ notify the defendant, and send a copy of the marked notice of appeal to the district appellate project. [¶] (4) The defendant need not comply with (1) if the notice of appeal states that the appeal is based on: [¶] (A) The denial of a motion to suppress evidence under Penal Code section 1538.5; or [¶] (B) Grounds that arose after entry of the plea and do not affect the plea’s validity. [¶] (5) If the defendant’s notice of appeal contains a statement under (4), the reviewing court will not consider any issue affecting the validity of the plea unless the defendant also complies with (1).”

173, 176–177; *People v. Latham* (1988) 206 Cal.App.3d 27, 30.) “The record must establish that the trial court understands that two separate and distinct decisions are involved in its sentencing choice: (1) To revoke probation; and (2) to sentence to state prison rather than place the defendant on probation on new or modified conditions.” (*People v. Cotton, supra*, at p. 1081.) Here, the court specifically considered the aggravating and mitigating factors enumerated in the probation report, and stated that modification of probation would be an inappropriate disposition given defendant’s lack of amenability to probation. The statement of reasons was brief but adequate, and the revocation of probation was not an abuse of discretion. (*People v. Sizemore* (2009) 175 Cal.App.4th 864, 875.)

Defendant was otherwise sentenced in accordance with the law. The selection of the lower term of imprisonment did not require a further statement of reasons, and also was not an abuse of discretion. (*People v. Thompson* (1982) 138 Cal.App.3d 123, 127.) The imposition of a four-year parole term was valid. (Pen. Code, § 3000.) The \$200 restitution fine was justified under Penal Code section 1202.4. The record does not reveal any indication of an erroneous calculation of sentence credits.

Upon review, we believe defendant was represented by competent counsel throughout the proceedings.

The judgment is affirmed.

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Dondero, J.

We concur:

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Margulies, Acting P. J.

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Banke, J.